

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-1182

B P/S

76-1182

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA

Appellee

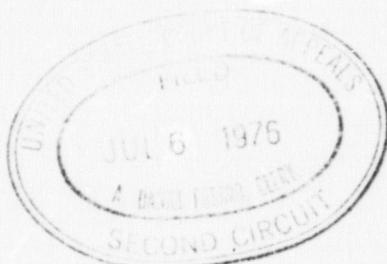
-against-

WILLIAM J. JOYCE, DONALD WALSH,
EDWARD J. BOYLE, THOMAS M. BURNS,
JAME S GRIMSLY, LEONARD NITTI,
JANET TERRI, also known as JANET
FERRY, ROBERT SCHOENLY, PETER
AREITER, LOUIS BOVELL, JOHN FREUDIGER,
and MORTON HANAN

Appellants

-----X

BRIEF ON BEHALF OF APPELLANT DONALD
WALSH PURSUANT TO ANDERS v. CALIFORNIA



JOHN C. CORBETT
Attorney for appellant WALSH
Office & P.O. Address
66 Court Street
Brooklyn, New York 11201

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PRELIMINARY STATEMENT UNDER SECOND
CIRCUIT RULE 28

The judgment herein was rendered after a jury trial before United States District Judge THOMAS C. PLATT, in the United States District Court for the Eastern District of New York, which found the appellant DONAL WALSH guilty of both counts of the indictment and judgment of conviction was entered on April 9, 1976.

STATEMENT OF THE ISSUE

The sole issue in this case is whether there are any non-frivolous issues as to DONALD WALSH on appeal.

STATEMENT OF THE CASE

The appellant DONALD WALSH was indicted, with others on a two count indictment, the first count charging the defendants with conspiracy to have in their possession Timex watches stolen from interstate commerce, in violation of Title 18 United States Code Section 659 and Section 2. The second count charged the unlawful possession of the said watches on March 17, 1975, knowing the same to have been stolen from interstate commerce in violation of Title 18, United States Code, Section 659 and Section 2.

Trial commenced on January 19, 1976. The first witness who testified against WALSH was ROBERT SCHOENLY, a co-defendant. He testified that he was acting as bartender at the TIC TOC LOUNGE in Lynbrook, New York, on March 17th, 1975. He testified that co-defendant WILLIAM J. JOYCE came into the bar and told him that he had taken the watches and had the packages in a truck. (Tr. 82). DONALD WALSH entered later with JANET TERRI and was informed of JOYCE'S theft by SCHOENLY, who knew WALSH was a cousin of JOYCE. WALSH said he knew of a place where the watches could be stored, and SCHOENLY, pursuant to WALSH'S instruc-

tions, rented a truck from Hub Truck Rental Company to move the watches. (Tr. 85-93).

PETER AREITER, another co-defendant, then testified that on the evening of March 17, 1975, WALSH, together with AREITER, LOUIS BOVELL, and THOMAS M. BURNS, transferred the cartons of watches from the truck in which they were taken from the airport to the rented truck, and from that truck to JANET TERRI'S house. The cartons were wrapped when delivered to TERRI'S house and AREITER was to receive \$3,000.00 for his services while BURNS' wedding was to be paid for. (Tr. 293-288). BURNS corroborated this testimony. (Tr. 420-433).

Then on March 21, 1975, the watches were taken from TERRI'S house by WALSH, BOVELL, JOHN FREUDIGER, and AREITER. They were brought by these individuals to a garage in Island Park operated by LEONARD NITTI. (Tr. 436-440). When they were moved at this time the wrappings had been removed from the cartons and the wrappings were in plastic bags. (Tr. 95-106).

EDWARD J. BOYLE, the operator of another bar, testified that he was approached by JOYCE to look for a customer to buy the watches stolen from Kennedy Airport. BOYLE made inquiries and then received a call from a Detective GIORDANO of the Port Authority Police who was acting undercover. BOYLE, JOYCE and WALSH, met the undercover detective passing as "JOE" at a bar and JOYCE gave him a sample. WALSH did not take part in the transaction. As a result, "JOE" agreed to buy the watches and BOYLE then called JAMES GRIMSLY, a co-defendant, to arrange for delivery. The watches were delivered to Brooklyn and arrests followed, WALSH being arrested later. (Tr. 590-605).

WALSH did not take the stand. He was convicted on both counts and received a sentence of 4 years on Count 1, plus a fine of \$5,000.00, and 5 years on

Count 2, plus an additional fine of \$5,000.00, both sentences of imprisonment to run concurrently, with a total fine of \$10,000.00.

POSSIBLE ISSUES ON APPEAL

The only possible issue on appeal is whether there was sufficient evidence to prove guilty knowledge on the part of WALSH in dealing with the watches.

The rule of law, early established by the Supreme Court of the United States, and a principle often applied in the 2nd Circuit was set forth in WILSON v. UNITED STATES, 162 U.S. 613, 619, 16 S. Ct. 895, 898, 40 L. Ed. 1090 (1896):

Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by circumstances or accounted for in some way consistent with innocence.

Here the testimony of SCHOENLY, in his conversation with WALSH on March 17, 1975, which was uncontested, shows that WALSH was informed that JOYCE had stolen watches from the airport. That he had the watches in his possession later on the same day is likewise uncontested, and the testimony of PETER AREITER and THOMAS M. BURNS established the fact that WALSH had custody and control of the watches when they were moved to TERRI's house to the NITTI garage. The evidence showed clearly that the concealing of the watches by WALSH was done with guilty knowledge. UNITED STATES v. BRAWER 482 Fed 2d 117 (2nd Cir. 1973).

The evidence of WALSH'S guilty knowledge met the strict standards of UNITED STATES v. TAYLOR 464 F2d 240 (2d Cir. 1972), and the jury was justified in returning a conviction on Count 2.

As to the existence of the conspiracy, the testimony of SCHOENLY shows that after JOYCE had stolen the watches and removed them from the airport, WALSH then became active in the concealing of the stolen property and a conspiracy

was then formed. On the same date the watches were stolen, March 17, 1975, the evidence shows that WALSH arranged for the rental of a truck from Hub Truck Rental Company. He then directed the unloading of the watches from the truck where they were then situated and moved them to TERRI'S house. On March 21, 1975, the evidence has WALSH again arranging for the removal of the watches from TERRI'S house to NITTI'S garage.

There is no question that ~~insofar~~ as WALSH was concerned the jury was justified in finding the existence of a conspiracy between WALSH, JOYCE, and the helpers who moved the watches. All of the testimony establishing these facts was not controverted by WALSH, and was sufficient to establish the existence of the conspiracy. The fact that WALSH did not participate in the later sale of the watches to the undercover detective is of no importance in assessing WALSH'S membership in the conspiracy.

It is not essential that each conspirator participate in all the activities. It is sufficient if the conspiracy is established and that WALSH knowingly contributed his efforts in furtherance of it. UNITED STATES v. BENTVENA 319 Fed 2d 916 (2nd Cir. 1962).

There are no other questions of law which can be raised on appeal by WALSH. The issues were questions of fact which were resolved against the appellant by the jury.

There are no non-frivolous issues on which WALSH may appeal.

CONCLUSION

For the above stated reasons, there are no non-frivolous issues which can be raised on appeal. Accordingly it is respectfully requested that JOHN C. CORBETT be relieved as counsel on this appeal.

Respectfully submitted,

JOHN C. CORBETT
Attorney for Appellant DONALD WALSH

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U. S. ATTORNEY

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EAST. DIST. N.Y.

Paula
J. Monone